IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LORRAINE SPEAR, Administratrix of the Estate of Kimberly Spear, Deceased Plaintiff,	:	**CIVIL ACTION**
v.	:	
RICHARD J. CARON FOUNDATION t/a Rosie Kearney House and AETNA U.S. HEALTHCARE and LIVENGRIN FOUNDATION, INC.,	:	
Defendant.	:	**NO. 99-0706**

MEMORANDUM

Reed, S.J. **September 28th, 1999**

Before the Court is the motion of Plaintiff Lorraine Spear, administratrix of the Estate of Kimberly Spear, deceased, to remand the above-captioned matter to the Court of Common Pleas of Philadelphia County, Pennsylvania (Document No. 5) pursuant to 28 U.S.C. §1447. Based upon the following reasons, the motion will be granted.

Plaintiff filed this action in the Court of Common Pleas of Philadelphia County, Pennsylvania on December 1, 1998. In her complaint, plaintiff alleges that defendant Aetna U.S. Healthcare and its agents were negligent in recommending that decedent's inpatient medical health care be discontinued.

The case was removed to the United States District Court for the Eastern District of Pennsylvania on February 10, 1999. Plaintiff seeks remand on the grounds that no federal question is presented. Defendants argue that Plaintiffs claims are preempted by the Employee Retired Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001-1461 (1988), and that

remand is therefore improper.

On a motion to remand, the defendant bears the burden of proving that removal was proper and that the district court has subject matter jurisdiction. See Wuerl v. International Life Science Church, 758 F.Supp. 1084 (W.D. Pa. 1991).

In Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 107 S.Ct. 1542 (1987), the Supreme Court recognized a limited exception to the "well-pleaded complaint rule" that federal question jurisdiction may only be had where issues of federal law are apparent on the face of the complaint. The Court held that "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." Id. at 63-64, 107 S.Ct. at 1546. The so-called "complete-preemption" doctrine has been found to convert state claims against insurance companies and health maintenance organizations into federal actions arising under ERISA. See, e.g. Pilot Life Ins., Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549 (1987); Corcoran v. United Heathcare, Inc., 965 F.2d 1321 (5th Cir.), cert. denied, 506 U.S. 1033, 113 S.Ct. 812 (1992).

The question before this Court, then, is whether the complete preemption doctrine applies to the case before us. Upon a thorough review of the relevant decisions in this Circuit, I conclude that the complete preemption doctrine is itself preempted in the present case, and that remand is appropriate.

As both plaintiff and defendant recognize, Dukes v. U.S. Healthcare, 87 F.3d 350 (3d Cir. 1995), lights the way for our inquiry. There, the Court of Appeals for the Third Circuit considered whether negligence claims against a health maintenance organization (HMO) were covered by ERISA. In analyzing whether the claim was preempted by ERISA, the court drew a

distinction between claims that allege the denial of a benefit due under insurance plan and claims that attack the quality of the benefit received by the plaintiff.[1] The court found that former claims are completely preempted by ERISA and the latter are not. Id. at 355. The court then looked to plaintiffs' complaints and determined that they did not allege the denial of a benefit and instead claimed relief under agency and negligence principles. Id. at 359. See also In re: U.S. Healthcare, Inc., 1999 U.S. App. LEXIS 22464, Nos. 98-5222, 98-5262, 98-5263 (3d Cir. September 16, 1999).

Plaintiff and defendants in the present case cite a number of unpublished cases decided by judges of this district on the issue of complete preemption under ERISA in insurance cases. The judges appear to be split between two approaches to such cases.

Under one approach, courts look to the complaint to determine whether it alleges on its face a denial of benefits due under the insurance plan, and if no such allegation is found, the doctrine of complete preemption does not apply. This approach is typified by DeLucia v. St. Luke's Hospital, 1999 U.S. Dist. LEXIS 8124, at *10-11 (E.D. Pa. May 25, 1999), in which the court considered plaintiffs' allegations of negligence against an insurance carrier based on the discharge of a newborn without a breathing monitor pursuant to the insurance company's criteria and concluded that the state claim was not completely preempted under ERISA. "I do not find

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[1] The distinction the court drew in Dukes was based on the language of § 502(a)(1)(B) of ERISA, which states, in part:

> A civil action may be brought –
>
> (1) by a participant or beneficiary – ...
>
> (B) to recover benefits due to him under the terms of his plan, to enforce rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. § 1132(a)(1)(B). The court found that claims to recover benefits due fell within language of the statute and were therefore preempted by ERISA.

that plaintiffs' complaint, either in these allegations or elsewhere, states a claim for a denial of a benefit due. When a plaintiff does not allege that a denied or omitted medical treatment or service was due under the plan, complete preemption does not apply." Id. at *10 (citing Miller v. Riddle Memorial Hospital, 1998 U.S. Dist. LEXIS 7752, No. 98-392 (E.D. Pa. May 28, 1998); Hoose v. Jefferson Home Health Care, Inc., 1988 U.S. Dist. LEXIS 1369, No. 97-7568 (E.D. Pa. Feb 6, 1998)). See also Snow v. Burden, 1999 U.S. Dist. LEXIS 6932, No. 99-1874 (E.D. Pa. May 6, 1999).

Under another approach, courts look behind the complaint to determine whether the allegations, in substance, constitute a denial of benefits claim. In Lazorko v. Pennsylvania Hospital, 1996 U.S. Dist. LEXIS 129, No. 95-6151 (E.D. Pa. Jan. 4, 1996), in which the plaintiffs alleged negligence against an HMO, the court concluded that the complaint "[a]lthough shrouded in language of state law ... raises allegations that defendant erroneously denied benefits under the health care plan," id. at *4, and that therefore the claims were preempted under ERISA. See also Lazorko v. Pennsylvania Hospital, 1997 U.S. Dist LEXIS 3900, at *10, No. 96-4858 (E.D. Pa. March 28, 1997).

I decline to engage in the kind of inquiry proposed by the latter cases.[2] Unearthing from the pleadings the "real" or true" nature of the claim is an excavation for which the court is not well equipped. I am much more comfortable reading the language of a complaint than minds of the plaintiffs. See U.S. Healthcare, 1999 U.S. App LEXIS 22464, at *27 (holding that the state

[2] The Supreme Court has described itself as "reluctant" to find complete preemption under ERISA. See Metropolitan Life v. Taylor, 481 U.S. 58, 64, 107 S.Ct. 1542, 1547 (1987). The Third Circuit has recognized complete preemption as merely a "limited exception to the well pleaded complaint rule," Dukes, 87 F.3d at 355, not a blanket rule of immunity from suit in state courts for ERISA-covered entities.

law claims were not preempted because "[t]he counts are phrased in terms of the quality of the medical care provided).[3]

Reading, then, the language of plaintiff's complaint, I find nothing to indicate that plaintiff claims a denial of a benefit due under the health plan issue by defendant Aetna U.S. Healthcare. Rather, the complaint revolves around the recommendations of Aetna and defendant Livengrin Foundation that the decedent, Kimberly Spear, "required only outpatient care as opposed to inpatient care despite the recommendations of her physician to the contrary." See Complaint, at ¶ 10. Nowhere does the plaintiff claim that Kimberly Spear was entitled to inpatient care under the health plan, nor does the plaintiff claim that inpatient care was specifically denied to Kimberly Spear.

Plaintiff's allegations thus attack the quality of the health care provided by defendants (i.e. the medical wisdom of the recommendation of Livengrin and Aetna to discontinue inpatient care) and not the quantity of the care provided (i.e., defendants' administrative decision to refuse to provide a benefit due under the health plan and requested by the plaintiff). As discussed above, under Dukes, a claim attacking the quality of the health care is not completely preempted by ERISA.

"When the doctrine of complete preemption does not apply ... the district court, being without removal jurisdiction .. lacks power to do anything other than remand to the state court

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[3] In U.S. Healthcare, plaintiffs alleged their sick child was discharged too early pursuant to HMO policy, that the HMO failed to provide a requested in-home visit by a pediatric nurse, and the child consequently died. Even there, the Court of Appeals for the Third Circuit did not find that the complaint alleged a denial of benefit, stating that the allegations went " to the quality of the care ... received rather than an administrative decision as to whether certain benefits were covered by the plan." U.S. Healthcare, 1999 U.S. App. LEXIS 22464, at *26.

where the preemption issue can be addressed and resolved." Dukes, 57 F.3d at 355 (citations omitted). Having concluded today that the doctrine of complete preemption does not apply and that defendants have not carried their burden of proving that this Court has subject matter jurisdiction, I must remand the case to the state court.

An appropriate Order follows.

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v.	:	
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Defendant.	:	**NO. 99-0706**

O R D E R

AND NOW, this 28th day of September, 1999, upon consideration of the motion of Plaintiff Lorraine Spear, administratrix of the Estate of Kimberly Spear, deceased, to remand the above-captioned matter to the Court of Common Pleas of Philadelphia County, Pennsylvania (Document No. 5), and the motion of Defendant Aetna U.S. Healthcare in Opposition to Plaintiff's Motion to Remand (Document No. 9) and memoranda in support thereof and responses thereto, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the within action is **REMANDED** to the Court of Common Pleas of Philadelphia County, Pennsylvania at Civil Action No. 003710, November Term 1998.

IT IS FURTHER ORDERED that the Clerk shall forthwith return the record to the Prothonotary of the Court of Common Pleas of Philadelphia County, Pennsylvania.

LOWELL A. REED, JR., S.J.